

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division**

In re KEITH A. DUFF)	Case No. 00-01458-13
)	
Debtor.)	
)	
_____ KEITH A. DUFF,)	
)	
Movant,)	
)	
v.)	
)	
AMERICAN GENERAL FINANCE OF)	
AMERICA, INC.,)	
)	
Respondent,)	
_____)	

MEMORANDUM & ORDER

This matter comes before the court on a motion by Keith A. Duff (“the Movant”) for entry of a default order granting his motion to avoid the judicial lien of American General Finance of America, Inc. (“the Respondent”). This Court has jurisdiction over this matter. 28 U.S.C. § 1334(a) & 157(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A)&(K). Accordingly, this court may render a final order.

Facts

For purposes of this motion, the court accepts the Movant’s well-pleaded facts as true.¹ The Court also accepts the assertions of the Movant in his schedules as filed under penalty of

¹ Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Fed. R. Civ. P. 8(d), as made applicable by Fed. R. Bankr. P. 7008.

“The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.” Geddes v. United Financial Group, et al., 559 F.2d 557 (9th Cir. 1977) (citations omitted).

perjury. On the date of petition, the Movant owned a fee simple interest in 5.07 acres of land in Louisa County, Virginia (“the Real Property”).

On April 17, 2000, the Movant recorded a previously acquired judgment in the amount of \$1,876.33 in Clerk’s Office of the Circuit Court of Louisa County, Virginia. There are no other consensual or non-consensual liens on the Real Property.

On May 22, 2000, the Movant filed the above-styled chapter 13 petition. The Movant scheduled the Real Property as property of the estate and listed its valued at \$7,800.00. The Debtor’s Schedule A indicates that the Real Property does not secure any debt. The Movant claimed the property exempt in the amount of \$5,837.00.

On August 31, 2005, the Movant filed the instant motion. In the motion, the Movant asserts that Respondent’s lien interest may be avoided as a preferential transfer 11 U.S.C. § 547 & 522(f)(1) [Sections 522 and 547 of the bankruptcy code] because it was recorded within the 90 day period pre-petition.

A hearing was held on the matter on October 17, 2005. The Respondent did not appear. The Movant has lodged an order that would declare the Respondent’s lien void in its entirety.

Discussion

This matter comes before the court on a motion for entry of a default order which may be brought in this Court under Fed. R. Civ. P. 55(b)(2) as provided for in Fed. R. Bankr. P. 7055 & 9014. When a Plaintiff brings a motion for the entry of a judgment by default, the trial court is required to exercise sound judicial discretion in determining whether the judgment should be entered. 10A Wright, Miller & Kane, Federal Practice and Procedure Civil 2d § 2685 (1998). Also see Lau Ah Yew v. Dulles 236 F.2d 415, 416 (9th Cir. 1956) (“It is conceded that the grant or denial of a motion for the entry of a default judgment is within the discretion of the court.”) When the defendant has not appeared, the plaintiff must still meet the burden of going forward. Cf. Peerless Industries v. Herrin Illinois Café, Inc. 593 F.Supp 1339, 1441 (E.D.Mo. 1984) (“In sum, Rule 55(b)(2) allows the court discretion to require proof of necessary facts to support a valid cause of action, and if such facts are lacking, the court can choose not to enter default judgment.”). The same is true when a movant seeks an entry of a default order.

The motion is brought under 11 U.S.C. § 547, which permits the trustee to avoid (1) a transfer of an interest of the debtor in property (2) that is made to or for the benefit of a creditor; (3) for or on account of an antecedent debt owed by the debtor before such transfer was made; (4) made while the debtor was insolvent; (5) made on or within 90 days before the date of the filing of the petition if the transferee is not an insider; and (6) that enables such creditor to receive more than such creditor would receive if the case were a case under chapter 7 of this title, the transfer had not been made, and the creditor received a distribution as provided by the provisions of the bankruptcy code.² Even though this Court accepts all averments in the complaint as true, the Movant can only partially prevail on the motion for entry of a default order.

A debtor may bring an action to avoid a transfer of property of the debtor, *to the extent that the property is properly claimed exempt* by the debtor, if (1) the transfer was involuntary; (2) the debtor did not conceal the property; (3) the trustee could avoid the transfer, but does not attempt to do so; and (4) the debtor has exempted the transferred property. See 11 U.S.C. §522(g)(1) and (h). Such an action may be initiated by motion even though a trustee must bring a preference action by way of adversary complaint under Fed. R. Bankr. P. 7001. See Fed. R. Bankr. P. 4003(d).

All four elements of the motion are met in this case. The Movant may avoid the

² Section 547(b) provides:

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made--
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if--
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Respondent's lien to the extent to the extent that it impairs the Movant's exemption if the elements of Section 547 (b) are met. A judicial lien against property of the debtor is a transfer of an interest of the debtor in property. It was clearly made for the benefit of a creditor. It was based on account of an antecedent debt. It was made while the debtor was insolvent.³ The recordation, hence the transfer, was made within 90 days before the date of the filing of the petition. Because the debtor's confirmed plan of reorganization provided for the payment of a 36% dividend to creditors, the transfer would have enabled the Respondent to receive more than it would receive if the case were a case under chapter 7 of this title, the transfer had not been made, and the creditor received a distribution as provided by the provisions of the bankruptcy code.⁴

We turn now to the determination of whether, and to what extent, the lien impairs the Movant's exemption. In 1994, the Congress amended the bankruptcy code to include paragraph 522(f)(2)(A) which provides a method for calculating the extent to which a lien shall be considered to impair a lien.⁵ A fair paraphrase of Section 522(f)(2) is as follows: A lien may be avoided to the extent that the sum of all liens on the property, including the lien in question, and any exemptions on the property, exceed the value of the property. Applying the formula as provided:

$$[(\$1,876.33 + \$5,837.00) - \$7,800.00] = \$86.67$$

The lien may be avoided to the extent of \$86.67.

³ A debtor is, for purposes of section 547, presumed to be insolvent during the 90-day period pre-petition. 11 U.S.C. § 547(f). While the presumption is rebuttable, the Respondent did not come forward with evidence to the contrary.

⁴ If the Respondent's judgment had not been recorded, the Respondent would have received a 36% dividend just as other unsecured claimant's. The recordation of the lien transformed the character of its claim, or part of it, to a secured claim which, by definition is paid 100% in a chapter 7 liquidation.

⁵ Section 522(f)(2) provides:
(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—
(i) the lien;
(ii) all other liens on the property; and
(iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens.

ORDER

For the above stated reasons, the motion to avoid the lien of American General Finance of American, Inc., is granted in part. The lien shall be and hereby is ordered avoided to the extent of \$86.67.

Upon entry of this Memorandum and Order the Clerk shall forward a copy to Dale E. Adams, Esq., attorney for the Debtor, the defendant, and the chapter 7 trustee.

Entered on this 3RD day of November, 2005.

A handwritten signature in black ink, appearing to read "William E. Anderson", is written over a faint, circular watermark of the United States Bankruptcy Court seal.

William E. Anderson
United States Bankruptcy Judge